LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAR 3 1955
HAROLD B. WILLEY, Clerk

No. 465 22

In the Supreme Court of the United States

OCTOBER TERM, 1954 5

MORRIS STEINER, HARRY LIGHTMAN, MITCHELL MAGID, AND B. B. STEINER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS CUMBERLAND BATTERY MANUFACTURING COMPANY, AND CUMBERLAND BATTERY MANUFACTURING COMPANY, A PARTNERSHIP, PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR RESPONDENT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
SYLVIA S. ELLISON,
Attorney,
Department of Labor,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Question presented	2
Statement	3
Discussion	8

CITATIONS

Case:

Mitchell v. *King Packing Co.*, 216 F. 2d 618 — 10

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Act of 1949, c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*) — 2

- Sec. 7 — 3
- Sec. 11 (c) — 3
- Sec. 15 (a) (1) — 3

Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251 *et seq.*) — 2

- Sec. 4 — 8

Tennessee Code Ann. (Williams, 1934), 1952 Supp.:

- Sec. 5788.15 — 7
- Secs. 6851–6901 — 7
- Sec. 6852 (d) — 7
- Sec. 6895 — 7

334600—55

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 465

MORRIS STEINER, HARRY LIGHTMAN, MITCHELL MAGID, AND B. B. STEINER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS CUMBERLAND BATTERY MANUFACTURING COMPANY, AND CUMBERLAND BATTERY MANUFACTURING COMPANY, A PARTNERSHIP, PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 218–222)[1] is reported at 111 F. Supp. 546. The opinion of the court of appeals (Pet. 43–52) appears at 215 F. 2d 171.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on

[1] "R" references are to the appendix to petitioners' brief in the court of appeals. "RR" references are to the appendix to respondent's court of appeals brief.

August 10, 1954. A petition for rehearing was denied without opinion on September 17, 1954. The petition for a writ of certiorari was filed on December 2, 1954, and the time for reply was extended by the Clerk, pursuant to Rule 34 (5) of the Rules of this Court, to March 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*), and of the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251 *et seq.*), are appended to the petition for a writ of certiorari (Pet. 37–41).

QUESTION PRESENTED

Where workers in a battery plant must make extensive use of dangerously caustic and toxic materials and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employer to provide, are these "principal," rather than "preliminary" or "postliminary," activities within the meaning of the Portal-to-Portal Act, so that they must be counted in measuring the work-time for which compensation is required by the Fair Labor Standards Act?

STATEMENT

The Secretary of Labor brought this action to enjoin petitioners from violating the overtime and record-keeping requirements of Sections 7 and 11 (c) of the Fair Labor Standards Act of 1938, as amended, in the employment of production workers, and from violating Section 15 (a) (1) of the Act by making interstate shipments of the goods produced by such workers.

Petitioners own and operate a plant located in Nashville, Tennessee, where they are engaged in manufacturing automotive-type wet storage batteries which they sell in interstate commerce. All of the company's production employees customarily work with or near the various chemicals used in the plant (fdg. 4, R. 213). These include lead metal, lead oxide, lead sulphate, lead peroxide, and sulphuric acid (*ibid.*). Some of these are in liquid form, some are in powder form, and some are solid (R. 102, 103, 118, 154, 181–183). In the manufacturing process some of the materials go through various changes (R. 26) and give off dangerous fumes (R. 47–48, 60, 70, 98–99, 126–127). Some are spilled or dropped and thus become a part of the dust in the air (R. 27, 71, 108, 117, 154). In general, the chemicals permeate the entire plant and everything and everyone in it (R. 26, RR. 12).

Lead and lead compounds are toxic to human beings (fdg. 6, R. 214). Thus, regular exposure to atmosphere containing as much as 1.5 milli-

grams of lead per ten cubic meters is regarded by the medical profession as hazardous and involving the possibility of lead intoxication or lead poisoning (*ibid.*). In battery plants, it is "almost impossible" to keep lead concentration in the air "within absolutely safe limits" (fdg. 7, R. 214). In petitioners' plant, "lead oxide was on the floor and in the air and on the plates which employees handled" (dist. ct. op., R. 221). Moreover, "abnormal concentrations of lead have been discovered in the bodies of some of [petitioners'] employees and [petitioners'] insurance doctor has recommended that such employees be segregated from their customary duties" (fdg. 14, R. 216; see also R. 206).

The primary ways in which lead poisoning is contracted are by inhalation and ingestion (R. 48, 60, 61; RR. 11), *i. e.*, by taking in particles through the nose or mouth, an open cut or sore, or any other body cavity (RR. 12–13).[2] The risk is "very great" (dist. ct. op., R. 220) and even exists outside the plant because the lead dust and lead fumes, which are prevalent in the plant, attach themselves to the skin, clothing, and hair of the employees (*ibid.*; RR. 20–23). Even the families of battery workers may be placed in some danger if lead particles are brought home in the workers' clothing or shoes (RR. 22–23).

Sulphuric acid in the plant is also a hazard.

[2] While lead may also be absorbed through the skin, the danger of becoming poisoned in this manner is slight (R. 48).

It is irritating to the skin and can cause severe burns (fdg. 5, R. 213–214; dist. ct. op., R. 220). When the acid contacts clothing, it causes disintegration or rapid deterioration (dist. ct. op., R. 220; R. 52–53). Moreover, the effects of sulphuric acid make the employee more susceptible than he would otherwise be to contamination by particles of lead and lead compounds (fdg. 5, R. 213–214).

Battery manufacturers, including petitioners, try to minimize hazards by plant ventilation, but industrial and medical experts are in agreement that ventilation alone is not sufficient to avoid the dangers of lead poisoning (dist. ct. op., R. 220). Safe operation also requires the removal of clothing and showering at the end of the work period (*ibid.*; also, R. 50–52, RR. 17–19, 32–35). Accordingly, in order to make their plant as safe a place to work as is possible under the circumstances and thereby increase the efficiency of its operation, petitioners have equipped it with shower facilities and a locker room with separate lockers for work and street clothing. Also, they furnish without charge old but clean work clothes which the employees wear (R. 175). Employees regularly change into work clothes before the beginning of the productive work period and shower and change back into street clothes at the end of that period (R. 10, 33–34). All of the production employees who testified stated that they changed their clothes at the beginning and end of

the productive work period, and, with a single exception,[2] that they showered or washed before leaving the plant (R. 30–31, 72, 81, 94–95, 105, 119, 128, 146, 156–157).

Although petitioners have not issued written instructions requiring their employees to change clothes and use the shower facilities that have been made available to them, various employees testified that the plant foreman had instructed them that they "all had to take a bath" (R. 105, 123, 138, 149), and that "he told the whole shop" to do this (R. 111, 132), "on account of lead" (R. 142). A signed statement of the foreman (R. 163) declared, "In the afternoon the men are required by the company to take a bath because lead oxide might be absorbed into the bloodstream. It protects the company and the employee both." See, also, R. 168–169, 172.

The changing of clothes is especially needed by those who work with sulphuric acid, because the acid eats wearing apparel. It is, of course, possible for the employees to work in their own clothes, but, as one of them testified, if he did, he "might go home naked" (R. 130). Furthermore, the cost of providing their own work clothing would be prohibitive for the employees (R. 131, 136, 139), since the acid causes such rapid

[2] The exception is an employee who has a wounded foot and is fearful of an infection if he uses a common shower. This employee therefore bathes at his home, "about five blocks" from the plant (R. 145–146).

deterioration that the clothing sometimes lasts only a few days (R. 36, 72, 92, 97, 104, 152, 158).

The changing of clothes and showering are a "recognized part of industrial hygiene programs" in the storage battery industry (fdg. 8, R. 214). Moreover, a Tennessee statute requires that—

> * * * every employer shall provide adequate and sanitary shower facilities when the workers are exposed to excessive heat, or to skin contamination with infectious, irritating, or toxic materials. [Tennessee Code Ann. (Williams, 1934), 1952 Supp., Sec. 5788.15.] [Fdg. 9, R. 214.]

In addition, the Tennessee Workmen's Compensation Act (Tennessee Code Ann. (Williams, 1934), 1952 Supp., Secs. 6851–6901), which covers petitioners, makes lead poisoning a compensable occupational disease (Section 6852 (d)). In order to comply with this statute, petitioners carry insurance, under Section 6895, to protect against liability (fdg. 10, R. 214–215). Their "insurance carrier would not accept the insurance risk if defendants refused to provide showering and clothes-changing facilities for their employees" (fdg. 12, R. 215; R. 65).

Petitioners concededly do not record or pay for the time which their employees spend in clothes-changing and showering, which was found to amount to thirty minutes a day (ten minutes in the morning and twenty minutes in the afternoon) for each employee (R. 221). Holding that

these activities "are made necessary by the nature of the work performed," that they "fulfill mutual obligations" between petitioners and their employees, that they "directly benefit" petitioners in the operation of their business, and that they "are so closely related to other duties performed by [petitioners'] employees as to be an integral part thereof and are, therefore, included among the principal activities of said employees," the trial court concluded that the time thereby consumed is not excluded from coverage by Section 4 of the Portal-to-Portal Act, but constitutes time worked within the meaning of the Fair Labor Standards Act (conclusions of law 3 and 4, R. 216–217). The court of appeals affirmed, likewise holding that the term "principal activity or activities" in Section 4 embraces "all activities which are an integral part of a principal activity" (Pet. 46) and that the activities in question fall within this category.

DISCUSSION

1. Section 4 of the Portal-to-Portal Act, while it makes "preliminary" and "postliminary" activities noncompensable, expressly preserves the compensability of all time spent by the employee in his "principal activity or activities." The latter phrase, the court below concluded, embraces an activity indispensable to the performance of productive work.

Applying this test, the court held that, while clothes-changing and showering would ordinarily be a "preliminary" or "postliminary" activity (which respondent fully concedes), in the circumstances they were so vitally and closely related to the effective performance of the employees' principal work that they were to be deemed an integral part of it. The particular circumstances, as found below, include the following: that prompt clothes-changing and showering at the end of the workday constitute an essential health measure required to minimize the serious hazards faced by production workers in battery plants; that the employees could not afford to provide the very frequent changes of work clothes which are necessitated by the fact that they work with harmful chemicals; that a failure by petitioners to provide showering facilities for employees exposed to caustic and toxic materials would violate state law; and that the activities involved fulfill mutual obligations between the company and its employees and directly benefit petitioners in the operation of their business. As indicated in the Statement, *supra*, these determinations are amply supported by subsidiary findings and by persuasive evidence.

2. The thrust of petitioners' arguments is that only work on the production line may be considered a principal activity, and that other activity, even though indispensably related to the produc-

tive process, is to be deemed embraced by the terms "preliminary" and "postliminary." This view of the statute was adopted by the Court of Appeals for the Ninth Circuit in *Mitchell* v. *King Packing Co.*, 216 F. 2d 618 (holding that essential knife-sharpening activities by butchers employed in a meat packing plant were noncompensable). The Government is filing, concurrently with this memorandum, a petition for a writ of certiorari in *King Packing*. We there indicate our reasons for believing that the interpretation which is being urged by petitioners here is inconsistent with the scheme and history of the Portal-to-Portal Act and of related statutory provisions. Instead of repeating that discussion, we respectfully refer the Court to the petition in *King Packing*.

While there are certainly factual differences between the instant case and *King Packing*, it appears that the opposing results as to statutory coverage are rooted in the issue of statutory interpretation. Indeed, the Ninth Circuit made express its disagreement with the Sixth Circuit's holding that the term "principal activities" is "sufficiently broad to embrace . . . such activities as are indispensable to the performance of productive work" (216 F. 2d at 621). Since this question of interpretation is one of fundamental importance in the administration of the Fair Labor Standards Act—its resolution will unquestionably affect the compensability of a variety of

activities in numerous industries—we do not oppose the instant petition, although we believe that the decision below is correct.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

SYLVIA S. ELLISON,
Attorney,
Department of Labor.

MARCH 1955.

LIBRARY
SUPREME COURT, U. S.

No. 22

Office - Supreme Court, U. S.
FILED
SEP 26 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

MORRIS STEINER, HARRY LIGHTMAN, MITCHELL MAGID, AND B. B. STEINER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS CUMBERLAND BATTERY MANUFACTURING COMPANY, AND CUMBERLAND BATTERY MANUFACTURING COMPANY, A PARTNERSHIP, PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

SIMON E. SOBELOFF,
Solicitor General,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
SYLVIA S. ELLISON,
Attorney,
Department of Labor,
Washington 25, D. C.